No. 12,675

IN THE

United States Court of Appeals

For the Ninth Circuit

M. P. MULLANEY, Commissioner of Taxation, Territory of Alaska,
Appellant,

vs.

LUTHER C. HESS and ALASKA JUNEAU GOLD MINING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

REPLY BRIEF FOR THE APPELLANT.

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This brief has been prepared as a reply to the arguments advanced in appellees' brief, pp. 11-22, and to the two additional points, not discussed by appellant in his opening brief, which have now been raised by appellees in their brief, pp. 35-42.

I. APPELLEES HAVE FAILED TO REFUTE THE POINTS MADE BY APPELLANT THAT UNIFORMITY AND EQUAL PROTECTION ARE IDENTICAL IN THEIR REQUIREMENTS AND THAT THERE ARE SUFFICIENT DIFFERENCES, UNDER SUCH REQUIREMENTS, TO JUSTIFY THE CLASSIFICATIONS ADOPTED BY THE LEGISLATURE.

A. The absence of judicial decisions on cases exactly in point does not establish the invalidity of the Act.

It is not enough to demonstrate the invalidity of the Act that there have not been discovered any judicial decisions wherein an identical taxing statute was considered with reference to a uniformity clause similar to that contained in Section 9 of the Organic Act. Consequently it is not at all relevant to a decision on the validity of the classifications adopted in this Act that the case of *Madden v. Kentucky,* 309 U.S. 83, was not decided on a state of facts similar to the case being considered here or that there have not been discovered any court decisions holding that a law identical with Ch. 10 S.L.A. 1949 meets the requirements of the Fourteenth Amendment. *Madden v. Kentucky,* supra, and other Supreme Court cases involving a construction of various taxing statutes as they relate to the equal protection clause in the Fourteenth Amendment were cited by appellant in his opening brief not to show that such cases involved identical fact situations but to demonstrate merely that when a government exercises its power of taxation, it has the greatest freedom in deciding how to best distribute the burdens of government by means of classifications. The point made by appellant was that uniformity and equal protection are essentially identical in their exactions, that a great variety of

classifications can be adopted by a legislature as long as they are not arbitrary and if a state of facts can be conceived to justify a difference in treatment between the different classes, that in making classifications the legislature does not have to achieve scientific uniformity, and that there appears no good reason (in spite of a lack of judicial authority) why the requirements of equality and uniformity should be any more restrictive with respect to ad valorem taxes than to income or excise taxes. This point appellees have failed to answer.

Also it is not as evident as appellees contend that "the Alaska law was designed to exempt from the tax all property within municipalities and school districts" (Appellees' Brief, p. 13). The Act is explicit in levying a 1% tax "upon all real property and improvements and personal property in the Territory" (Ch. 10 S.L.A. 1949, Sec. 3). Under this apparently mandatory language, the first ten mills of tax that the cities and school districts assess and collect would be that levied by the Territory and not by the local taxing units irrespective of the amount of tax that the local units had established as their levy under their local ordinances.

However, even if the Act could be interpreted so as to sanction a virtual exemption from the territorial tax of the cities and school districts, there would be nothing unconstitutional in this; for if there are sufficient differences between Class I and Class II property to justify different procedures for assessment and collection of the tax, then it would follow logically

that these differences would also justify a variation in the rate of the tax itself. See *Mich. Central R. R. Co. v. Powers,* 201 U.S. 245, 300. Contrary to what appellees maintain is the law (Appellees' Brief. p. 14), an exemption from taxation is not something different from a classification since "the right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them * * *" *Magoun v. Illinois Trust & Savings Bank,* 170 U.S. 283, 299.

B. Appellees have failed to make any showing that the Act either in its purpose or practical operation affects any unconstitutional discrimination.

The soundness of appellant's demonstration in his opening brief that there are substantial differences between Class I and Class II property reasonably justifying differences in treatment and thus sufficient to allow different methods of assessment and collection of an ad valorem tax (Appellant's Brief, pp. 16-24) has not been refuted or even disturbed by anything appellees have advanced in their answer (Appellees' Brief, pp. 14-18). For appellees to show what the value of taxable property is in the City of Fairbanks and the Fairbanks Independent School District, how much money would be raised by imposing a 1% tax on this property, and to then compare this sum with the total school budget for that area really demonstrates nothing that has any logical relevancy to the argument advanced by appellant. The relevant facts to be considered here are these:

(1) That in a 14-year period between 1934-1948 persons residing in Class I areas (incorporated cities and towns and school districts) were obliged to pay by way of local ad valorem taxes one-third of the cost of their schools, while the territorial government contributes the remaining two-thirds. (R. 150.)

(2) That during this same period, persons residing in Class II areas (territory outside of incorporated cities, towns and school districts) paid no ad valorem taxes whatsoever and contributed nothing directly to the support of their schools, but received from the Territory not merely two-thirds but complete support for their schools. (R. 150.)

(3) That the record in this case shows that the ad valorem tax levy in the Juneau Independent School District and the City of Juneau for school purposes was seven mills in 1948 and seven mills in 1949 (R. 101-102); in the City of Douglas and the Douglas Independent School District twelve mills in 1948 and ten mills in 1949 (R. 106-107); in the City of Fairbanks and the Fairbanks Independent School District six mills in 1948 and ten mills in 1949—an average of approximately nine mills for school purposes during this two-year period in the cities and school districts involved in this case.

(4) That since the enactment of the Alaska Property Tax Act, those persons residing in Class II areas outside of incorporated towns, cities and school districts now are obliged to pay an ad valorem tax of ten mills, an amount which presumably could be

considered as reimbursement to the territorial government for the particular advantages that those persons in Class II have received by reason of residing there and not within incorporated cities, towns and school districts.

In the light of these facts, how can it in all seriousness be contended that a ten mill tax on property that never before has been subject to an ad valorem levy is so lacking in equality and uniformity as to violate constitutional prohibitions? At the very least there is sufficient here to suggest that the two classes can be treated differently and that there may be validly applied to each a different tax law. This is sufficient to create a presumption that this legislative scheme of attaining an equitable distribution of the burden of government is constitutional, and appellees have completely failed to produce any facts which would tend to negative the basis of this legislative arrangement. See *Madden v. Kentucky,* 309 U.S. 83, 88. There is then no purpose to discriminate between appellees' property in Class I and their property in Class II disclosed on the face of the Act itself, and appellees have failed to show that in fact such classification operates to effect any discrimination or in any way to injure appellees. Cf. *General American Tank Car Corporation v. Day,* 270 U.S. 367, 372-375.

Since the Act, therefore, is fair and reasonable in its purpose and practical operation, its invalidity is not established by possible failure to achieve equality of taxation with mathematical exactitude. *General American Tank Car Corporation v. Day,* supra, p.

373; *Travelers Ins. Co. v. Connecticut,* 185 U.S. 364, 371-372. As the United States Supreme Court stated in *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69-70, by Mr. Justice McKenna:

> "* * * To be able to find fault with a law is not to demonstrate its invalidity * * * The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only palpably arbitrary exercise which can be declared void under the Fourteenth Amendment * * *"

II. THE OTHER POINTS RAISED BY APPELLEES BUT NOT CONSIDERED IN APPELLANT'S BRIEF DO NOT SUSTAIN APPELLEES' CLAIM THAT THE ACT IS INVALID.

A. The absence of provisions in the Act for an over-all board of equalization does not cause the Act to fail for lack of uniformity.

In appellees' complaints it was alleged as an additional reason for the claim that the Act was invalid that "there is no method provided in the Alaska Property Tax Act nor in any law of the Territory for equalization of assessments as between different municipalities or taxing units or between any of these and outside areas, or between the outside areas in the several judicial divisions". (R. 13, 26.) A part of this contention, that is, the lack of the equalization between the four judicial divisions in Class II areas,

was not discussed in appellant's opening brief since the district court, in its opinion, held that the absence of a provision in the Act for a board of equalization to equalize the taxes of the various taxing districts in various judicial divisions did not in itself show a lack of uniformity. (R. 52-53.) Appellees, however, have now raised this point in their brief (Appellees' Brief, pp. 35-40), and appellant replies to this contention as follows:

(1) With respect to the lack of provision for equalization of provisions between Class I and Class II property and between the various taxing units within Class I, what has been already said by appellant in his opening brief obviates the necessity for any further argument on this point. (Appellant's Brief, pp. 23-27.) If the classifications adopted in the Act are proper and sufficient to justify different procedures for assessing and collecting the tax, then it follows that no equalization of assessments between these different classes would be required. See *Michigan R.R. Tax Cases,* 138 F. 223, 241, affmd. in 201 U.S. 245.

(2) Neither is it a valid objection that the Act does not provide for a territorial board of equalization to equalize assessments of Class II property among the four judicial divisions of the Territory. There is nothing here that deprives appellees of any of their constitutional rights. First of all, if a Class II taxpayer in any judicial division, after having had full opportunity for notice and hearing before his divisional board of equalization (Ch. 10, Secs. 23, 25,

27, 28), feels aggrieved by an order of such board, he has the right of appeal on a *de novo* basis to the district court. (Ch. 10, Sec. 31.) And this procedure certainly constitutes due process of law. *Lent v. Tillson,* 140 U.S. 316, 326-328; *Mich. Central R.R. Co. v. Powers,* 201 U.S. 245, 301-302. Secondly, as far as equal protection is concerned, although the lack of a central board of appeal may not be justified on the ground of any permissible classification as it was in the *Mich. R.R. Tax Cases,* 138 F. 223, 241, since there apparently is no basic distinction between any property within Class II whether it is located within one particular judicial division or another, yet there has been no showing by appellees that the tax in fact bears unequally on property within the same class and that such inequality is intentional and systematic. See *Charleston Assn. v. Alderson,* 324 U.S. 182, 190-191. Appellees, therefore, not having shown themselves to be injured by this alleged lack of uniformity, cannot assail the constitutionality of the Act in this respect. Cf. *Alaska Steamship Co. v. Mullaney,* 180 F. (2d) 805; *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346.

B. The validity of Ch. 88 S.L.A. 1949, which amends Ch. 10 S.L.A. 1949, cannot now be questioned by appellees.

Appellees raise the additional point that Ch. 88 S.L.A. 1949, which amends the Alaska Property Tax Act as far as is concerned the valuation of boats and vessels engaged in marine service on a commercial basis, is also invalid. This argument was made in the lower court by appellees but was decided adversely

to their contention. The trial court found that appellee Luther C. Hess had no boats, and that appellee Alaska Juneau Gold Mining Company had elected to pay the tax on its boats, and that, therefore, neither of the appellees had been injured by the amendment in Chapter 88. (R. 83-84, 65-66.) Hence the lower court, in its Conclusion of Law No. II (R. 84), stated "That neither the plaintiff nor the intervenor is in a position to assert that Chapter 88 of the Session Laws of Alaska 1949, is invalid, so this court will not consider whether said Chapter 88 is valid or invalid. What is said hereinafter is said as to property other than boats and vessels." Moreover, the judgment entered in the lower court expressly exempted from the injunction the tax on boats and vessels. (R. 90.)

In view of this record of the case, appellees' claim that Chapter 88 is invalid cannot be availed of here in the absence of a cross-appeal. Appellees are not attacking the lower court's reasoning in an effort to support the decree, but are attacking the decree of the lower court with a view of either enlarging their own rights thereunder or of lessening the rights of appellant, since what they want this court to do is to declare Chapter 88 unconstitutional—something that the lower court refused to do. Since appellees have not obtained the allowance of a cross-appeal in this matter, they cannot confer jurisdiction on this appellate court to consider and decide this question. *U. S. v. American Railway Express Co.,* 265 U.S. 425 435; *Morley Co. v. Maryland Casualty Co.,* 300 U.S. 185, 191; *LeTulle v. Scofield,* 308 U.S. 415, 421-422.

CONCLUSION.

For the reasons shown in appellant's opening brief and in this reply brief, it is respectfully submitted: (1) that the decree of the district court should be reversed to the extent that it holds that Chapter 10, Session Laws of Alaska, 1949, except as to boats and vessels under Chapter 88, Session Laws of Alaska, 1949, is invalid; and (2) that the case should be remanded to the district court for entry of a decree declaring Chapter 10, Session Laws of Alaska, 1949, to be valid in its entirety, dissolving the permanent injunction, and dismissing appellees' complaints.

Dated, Juneau, Alaska,
January 29, 1951.

Respectfully submitted,

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